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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1223

RICHARD A. SPRAGUE,

Petitioner,

vs.

F. EMMETT FITZPATRICK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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AND NOW, this 1st day of March, 1977, Richard A. Sprague, your Petitioner, respectfully prays that this Honorable Court grant a Writ of Certiorari to review a judgment of the United States Court of Appeals for the Third Circuit dated December 6, 1976, by which that court affirmed the judgment of the United States District Court for the Eastern District of Pennsylvania which dismissed your Petitioner's Complaint against Respondent.

OPINIONS BELOW

Attached hereto as Appendix A is a copy of the opinion of the court below which is reported at 540 F.2d 560 (1976); attached hereto as Appendix B is a copy of the opinion of the United States District Court for the Eastern District of Pennsylvania which is reported at 412 F. Supp. 910 (1976).

JURISDICTION

This Honorable Court has jurisdiction to grant a Writ of Certiorari pursuant to the Act of June 25, 1948, c. 646, 62 Stat. 928, 28 U.S.C.A. § 1254(1), the judgment of the United States Court of Appeals for the Third Circuit having been entered on December 6, 1976 and the instant Petition having been filed within ninety (90) days of that date.

STATEMENT OF THE QUESTION PRESENTED

May the truthful statements of Mr. Sprague (Petitioner here) in the exercise of his Constitutional right to speak on an issue of public importance, *i.e.*, the facts as to the manner in which the elected District Attorney (Respondent here) was conducting his public office—namely, that the District Attorney of Philadelphia had given false public interviews on four separate occasions in justification of his agreement to probation for a multiple felony offender whom he had previously represented as private counsel in this Court—made at a time when Mr. Sprague was the appointed First Assistant District Attorney of Philadelphia furnish a Constitutional basis for Sprague's dismissal from public employment as First Assistant District Attorney simply because of the offensive personal impact of that statement on the District Attorney?

STATEMENT OF THE CASE

This is an action for money damages brought under the Civil Rights Act of 1871, 42 U.S.C. §1983, with federal jurisdiction being founded on 28 U.S.C. §1343(3).

Factually, the case involves the firing of Petitioner Sprague from his appointed position as First Assistant District Attorney by Respondent Fitzpatrick (the recently-elected District Attorney) as the result of an interview given at the instance[1] of the Philadelphia Inquirer newspaper in which Mr. Sprague truthfully commented on various false public statements by Fitzpatrick explaining how he, Fitzpatrick, had personally appeared in a courtroom and caused a multiple offender, one Joseph Nardello, to receive probation contrary to the long-standing recommendation for imprisonment noted on the official files of the District Attorney's office.

The text of the interview as published by the Inquirer (and agreed by both Sprague and Fitzpatrick to be a correct version of the interview) is as follows (R., pp. 44a-45a):

> "Nardello had been convicted by a jury in 1969 on the stolen goods charge, but his sentencing had been delayed until this year because of his health and legal arguments over defense motions for a new trial.
>
> "When Fitzpatrick ended the case last July, he recommended probation for Nardello in return for the withdrawal of the motions for a new trial by Nardello's attorney, A. Charles Peruto.

1. Petitioner Sprague did not seek out the press in order to confront his chief. Rather, when a representative of the press, in an unsolicited interview, squarely put the question whether certain statements made by Fitzpatrick accurately represented the facts, Mr. Sprague responded truthfully to those questions. Unfortunately for Mr. Fitzpatrick, Mr. Sprague's truthful answers to the reporter's questions demonstrated that Mr. Fitzpatrick had spoken falsely.

"Since the story was first reported, Fitzpatrick has twice appeared on talk shows on radio station WCAU to explain his actions.

"Here are Girzpatrick's [sic] statements, and Sprague's conflicting accounts:

[1] " 'There was a deal, an arrangement made before I became district attorney, Mr. Nardello would withdraw his motions for a new trial if the judge would impose a probationary sentence.'—Fitzpatrick, Nov. 21, 1974 WCAU.

"Sprague, who was first assistant also under the administration of Arlen Specter, said he had consistently ordered that a 2½-to-5 year prison sentence be recommended for Nardello. The Fitzpatrick statement, he said, 'is not true.'

"Sprague said that on 'numerous occasions' Nardello's attorney had offered to withdraw his motions in exchange for a recommendation of probation.

" 'I opposed it, would not permit it, and instructed the assistant district attorney (Judith Dean) that we would not agree to that and, if we won the motions, she was to ask for 2½-to-5 years in prison, Sprague said.

[2] " 'This was one of a bunch of old, infirm cases that had just kicked around and been maltreated in the D.A.'s office for a number of years.'—Fitzpatrick, Nov. 21, 1974, WCAU.

" 'Not true,' said Sprague.

"After the conviction, we attempted to get the motions disposed of, but the case was constantly postponed by defense counsel in their attempt to get us to change our mind on the sentence,' Sprague said.

"He said he had ordered the case listed 'almost monthly in 1973 in an attempt to get the motions disposed of, but 'Peruto [defense counsel] was able to get the judge to postpone it.'

" 'If there had been a deal, why would there have been our constant attempts to dispose of it and their constant attempts to postpone it?' he asked.

[3] " 'I was told by Mr. Stevens (William Stevens, chief of the trial division) that this case was regarded by the assistant district attorney assigned to it, a young lady by the name of Dean, as a loser.'—Fitzpatrick, Nov. 27, 1974, WCAU.

"Sprague said he did not know what Stevens may have told Fitzpatrick, but he added: 'I can tell you what Miss Dean told me in Stevens' presence.'

"Sprague said Miss Dean's position, stated in a meeting last June with Sprague and Stevens, 'was that there was one legal question of some difficulty, but she wanted to argue it and felt she could win it.'

" 'She never told me that the case was a loser or that we should agree to probation,' Sprague said.

[4] " 'You are asking me did I make the decision whether or not probation was the proper sentence, and the answer has to be that it was not my decision.' —Fitzpatrick, Oct. 31, 1974, interview with Inquirer reporters.

"Last June, Sprague recalled 'I got a call from Miss Dean who said she did not know what was going on. She told me she got a call from Stevens telling her to arrange probation for Nardello.

" 'I called her and Stevens in, and I asked Stevens, 'What the hell is going on?' Sprague said.

"Stevens said that all he knew was that Fitzpatrick told him to arrange probation for Nardello.

" 'I asked Stevens what he knew about the case and if Fitzpatrick knew about the case and Nardello's background.

" 'Stevens said he knew nothing—that he was just a conduit for Fitzpatrick's instructions,' Sprague said.

"Sprague added that he tried to call Fitzpatrick 'immediately' to find out what was happening, but was unable to reach him.

"'I then asked Miss Dean if there was any reason to drop our motions and she said no, she wanted to argue the case.

"'I told her that since I wasn't satisfied that Fitzpatrick knew the background of the case, she was not to go into court and arrange probation,' Sprague said.

"Miss Dean then went to the hearing and told Common Pleas Judge Maurice Sporkin that she would not recommend probation but, if asked, would recommend 2½ to 5 years. The case was then continued again at the defense lawyer's request.

"Stevens refused to discuss the case with the Inquirer.

[5] "'Now all of the information that I got on the case, I want you to understand, came from my chief of the trial division.'—Fitzpatrick, Nov. 21, 1974, WCAU.

"Sprague said however, that he had supplied information to Fitzpatrick's office some-[sic]

"Sprague said he had gone to Fitzpatrick's office sometime after the meeting with Miss Dean and Stevens to discuss the case.

"'I hold [sic] him that Miss Dean had gotten instructions from Stevens, but I said I didn't think he (Fitzpatrick) knew of the background of Nardello.

"'I told him that if asked in court for a recommendation, she had been instructed by me to recommend 2½ to 5 years in prison. I said Nardello is a bad apple, that he should get 2½ to 5 years, and that we had been fighting the case for a long time.

"'I made that very clear to him.'

"Within two weeks, Fitzpatrick personally appeared in court and recommended that Nardello be placed on probation.

"Sprague said he learned of it only after the sentencing had been completed."

The facts relevant to the issues raised by this Petition are set forth in a detailed Affidavit filed by Petitioner Sprague with the District Court (R., pp. 22a-36a):[2]

"I. OFFICIAL RELATIONSHIP BETWEEN DISTRICT ATTORNEY AND FIRST ASSISTANT DISTRICT ATTORNEY

"In Philadelphia the District Attorney is elected for a term of four years. He is the head of the District Attorney's Office and sets the policy and programs to be followed by the Office.

"The First Assistant District Attorney [is appointed by the District Attorney and] . . . is the person who acts in place of the District Attorney in the event the District Attorney is unavailable or is out of the city. In addition the First Assistant District Attorney is the administrative head of the District Attorney's Office whose job it is to see that the established policies are carried out.

• • •

"Thus it can be said that the District Attorney sets policy for the District Attorney's Office, that the First Assistant sees that the policies of the District Attorney are carried out and that the day-to-day operations of the Office are handled and carried out in a proper, expeditious fashion. The First Assistant is also an adviser to the District Attorney with regard to suggestions and implementations of various programs within a District Attorney's Office.

II. RELATIONSHIP BETWEEN F. EMMETT FITZPATRICK AND RICHARD A. SPRAGUE

"Upon Mr. Fitzpatrick's election as District Attorney of the City of Philadelphia he expressed an interest in

2. While there are no differences in material facts between Petitioner and Respondent as represented by their Affidavits, given the procedural posture of this case the statements of fact contained in the Affidavit filed with the courts below by Petitioner must be taken as true for purposes of this Petition. Cf. Wright v. Miller, *Federal Practice and Procedure*, § 2716 and the cases collected at ftn. 90 thereof.

having me continue as First Assistant District Attorney over his new administration.[3]

• • •

III. THE FACTS AS TO THE NARDELLO CASE

"In 1968 the District Attorney's Office prosecuted Joseph Nardello on a charge of receiving stolen goods. In this case, the evidence indicated that there had been a substantial burglary and robbery from the DuPonts in Florida. In the course of this crime—in which $2,000,000 worth of bonds were stolen—a valuable coin collection was taken. Some of the stolen coins were subsequently traced to the possession of Joseph Nardello in Philadelphia, who had attempted to sell these coins back to the DuPonts for $50,000-$60,000.

"Nardello had a record of previous felony convictions and never had gone to jail. He also had been convicted of receiving money in Philadelphia on previous occasions for purposes of fixing cases in our City Hall courts.

"In this circumstance, I assigned Richard G. Phillips to try the case against Nardello with instructions that, in the event he convicted Nardello, he was to recommend a substantial term of imprisonment. Mr. Phillips tried Nardello and convicted him. I ordered Mr. Phillips to make a recommendation of 2½-5 years in prison.

"Sentence thereafter was deferred by the Court. Immediately after the conviction, defense counsel, A. Charles Peruto, approached the District Attorney's Office saying that if they would agree to recommend probation or agree to the judge's imposing probation for Nardello, he would not pursue motions for a new trial. This offer by Mr. Peruto was rejected. We opted to argue the motions for a new trial."

• • •

3. Mr. Sprague first became employed as an Assistant District Attorney in the City of Philadelphia in February 1958 and served as First Assistant District Attorney at all times from June, 1966 through his firing in December, 1974.

"The matter eventually ended up in the hands of Judith Dean, who had prepared and filed our brief with the Court in opposition to the post-trial motions. Mrs. Dean was instructed to recommend a sentence of 2½ to 5 years. This same recommendation—2½ to 5 years—had been written on the file immediately after the conviction in 1969 by Detective Winchester. During the course of the years there were numerous attempts by Mr. Peruto to persuade us to agree to probation for Nardello, contending that Nardello was a sick man, and so forth. Nonetheless, my position—and the posi'ion of the Office of the District Attorney—continued throughout to be a recommendation of 2½ to 5 years.

"When the election for District Attorney came up in November, 1973, I again tried to get the case disposed of; however, Mr. Peruto was able to get the case postponed in November (and again in December) for the reason that there was a new District Attorney to contact.

"In the Spring of 1974 Judith Dean was about to go to court to argue the post-trial motions in the Nardello case when she was contacted by William Stevens, the Chief of the Trial Division, who told her that she was to agree to probation. Mrs. Dean reported this conversation to me; I called Mrs. Dean and Mr. Stevens into my office and asked Mr. Stevens for an explanation. He stated that he was a conduit for the District Attorney, Mr. Fitzpatrick, who had told him to arrange for probation for Nardello. When I inquired of Mr. Stevens whether he knew what had been going on in this case, Mr. Stevens said no, that he was merely a conduit for Mr. Fitzpatrick. When I wanted to know whether Mr. Fitzpatrick knew what the background was, Mr. Stevens said that he did not know. I was unable to reach Mr. Fitzpatrick by 'phone; he was apparently out of town.

"I then asked Mrs. Dean, as I had constantly, whether there were any legal problems in the case. She replied, as she had always previously replied, that there was one issue on which a good argument could be made

on each side; she thought, however, we ought to win the case and she wanted to argue the post-trial motions. I then told Mrs. Dean that she was to go to court, subject to the following instructions: in view of the fact that Mr. Fitzpatrick's office policy was that no recommendation of sentence was to be made to the Court unless asked for, she was to tell the Court on the record that no recommendation would be made. However, she was to advise the Court and defense counsel at side bar that in the event she was asked for a recommendation it would still be 2½ to 5 years. She was to advise the Court to this effect so that there would be no misunderstanding by the Court with regard to our silence on recommendation that we were agreeing to probation.

"Mrs. Dean did what she was told to do. Mr. Peruto told the Court that he had a different understanding with the District Attorney's Office; hence, the matter was again postponed so that Mr. Peruto might speak to the District Attorney.

"Subsequently, I advised Mr. Fitzpatrick as to what had happened; that is, concerning Mr. Stevens' contact with Judith Dean and my orders to her. I recounted to Mr. Fitzpatrick what the Nardello case was about, I told him about the case, told him about Nardello's background and told him that we had been recommending a sentence of 2½ to 5 years. I further advised Mr. Fitzpatrick that, in light of his policy of no recommendation on sentence to the Court unless specifically requested, my instructions to Mrs. Dean had been to advise the Court that in accordance with Mr. Fitzpatrick's policy we would not make a recommendation; however, she was to let the Court and defense counsel know that, if asked, our recommendation would be 2½ to 5 years.

"Mr. Fitzpatrick stated no objection to what I had done and indicated no disagreement with my instructions.

"In July, 1974, Mr. Fitzpatrick told me by 'phone that he had arranged to take the Nardello case into court,

that he (Fitzpatrick) had gone along with probation, and that Nardello had been placed on probation."

"IV. FACTS AS TO THE INTERVIEW OF FIRST ASSISTANT DISTRICT ATTORNEY RICHARD A. SPRAGUE BY THE PHILADELPHIA INQUIRER

"In late August, 1974, various representatives of the news media began to inquire into the facts surrounding the disposition of the Nardello case for the reason that allegations had been made concerning Mr. Fitzpatrick's representation of Nardello while he, Fitzpatrick, was in the private practice of law.[4] Specifically, the news media began to inquire into the reasons behind Mr. Fitzpatrick's unusual appearance personally in a courtroom and into the facts and circumstances surrounding the agreement whereby Nardello obtained a sentence of probation. In a 'first' series of responses to the questions raised by the news media about his participation in the Nardello case, Mr. Fitzpatrick said that he had acted on the recommendation of his staff, especially William Stevens. In that interview, Mr. Fitzpatrick denied that it was has recommendation which led to Nardello's probation.

"These statements by Mr. Fitzpatrick at the 'first' interview were, of course, exactly contrary to the statements made by Mr. Stevens in my office as referred to above. That is, in my office Mr. Stevens indicated a lack of personal knowledge concerning the Nardello case; to the contrary, Mr. Stevens told me that he was acting on Mr. Fitzpatrick's instructions. Nevertheless, I made no public utterance on this conflict because I could not be sure that Mr. Fitzpatrick and I had not, respectively, received conflicting points of view from Mr. Stevens.

"Thereafter, in a 'second' series of responses to questions raised by the news media, Mr. Fitzpatrick attrib-

4. The representation included oral argument in this Court on behalf of Mr. Nardello in an unrelated case after the conviction of Nardello in the Pennsylvania state case where Fitzpatrick ultimately agreed, as District Attorney, to probation. *United States v. Nardello*, 393 U.S. 286 (1969).

uted the recommendation of probation for Nardello to Mrs. Dean, alleging that Mrs. Dean had declared the case to be a 'loser.' This 'second' set of answers was again, contrary to my conversations with Mrs. Dean and was contrary to her statement in my presence in my office at the meeting involving Mr. Stevens and myself. Nevertheless, I continued to remain silent concerning the Nardello case giving Mr. Fitzpatrick the benefit of the doubt on the assumption—or, indeed, the hope—that someone had given him inaccurate information.

"Thereafter, in a 'third' set of answers to news media questions, Mr. Fitzpatrick said that the only person in the District Attorney's Office with whom he had spoken with regard to the Nardello case was Mr. Stevens.

"This statement, I knew, as a matter of personal knowledge, to be untrue. In fact, as related above, I had personally reviewed the Nardello case with Mr. Fitzpatrick and informed him of the basis for my recommendation of sentencing, i.e., 2½ to 5 years.

"As a result of this personal knowledge that Mr. Fitzpatrick had not spoken truthfully concerning the Nardello case, I asked for a personal interview. Instead, Mr. Fitzpatrick came to a City Hall courtroom where I was personally handling a pre-trial matter in a murder case. In response to his inquiry, I told Mr. Fitzpatrick that I was concerned about his statements to the press and to the public concerning the Nardello case, especially since he had been saying things that were contrary to the true facts. I specifically reminded Mr. Fitzpatrick of my conversation with him concerning the Nardello case.

"Mr. Fitzpatrick's response to my comments was to indicate that he, in fact, had been making the statements but that he was covering up to protect Judge Sporkin, the sentencing Judge. He suggested that he made these statements to the press and to the public in order to be a 'nice guy' and to protect the Judge at

whose behest he (Fitzpatrick) had agreed to probation. (Parenthetically, I state that I did not then—and do not now—believe that Mr. Fitzpatrick spoke truthfully in suggesting that he was telling falsehoods to protect Judge Sporkin.)

"Thereafter, Mr. Fitzpatrick gave a 'fourth' series of answers to the news media questions concerning the Nardello case. At that time, Mr. Fitzpatrick said that he was merely carrying out an agreement entered into by the Specter administration whereby it had been agreed that Nardello might be placed on probation. This statement was, of course, not true.

"Shortly thereafter, a reporter for the Philadelphia Inquirer approached me and asked me specific questions concerning the Nardello case and asked me with specificity and particularity whether various statements made by Mr. Fitzpatrick were correct. This interview by the Philadelphia Inquirer was neither instigated nor solicited by me. However, *upon having the specific questions put, my options were: first, tell the same stories as Mr. Fitzpatrick and thereby lie to the public; second, answer 'no comment' which would permit misstatements to the public to continue uncontradicted upon the record; or third, tell the truth. I chose to tell the truth.*[5]

"The Philadelphia Inquirer printed my interview concerning the Nardello case in editions dated December 4, 1974.[6]

"V. FACTS AS TO THE DISMISSAL OF RICHARD A. SPRAGUE AS FIRST DISTRICT ATTORNEY

"Following publication on December 4, 1974 by the Philadelphia Inquirer of my interview as to what had occurred in the Nardello case, I was asked on December 5, 1974 to see Mr. Fitzpatrick.

"Mr. Fitzpatrick and I met in his office. Mr. Fitzpatrick asked me whether or not what had been pub-

5. Emphasis supplied.
6. The text of the published interview is set forth, *supra*, at pp. 3-6.

lished in the Inquirer was accurate. I said it was. He wanted to know why I had given the interview. I answered Mr. Fitzpatrick essentially as follows: 'Because you have been making statements to the public that are untrue. I warned you that you were making statements that were untrue and yet you went ahead and made a further statement to the public that was totally untrue; namely, that there had been this previous deal in the prior administration to grant Nardello probation.'

"Mr. Fitzpatrick tried to counter by saying that there had been an offer of probation in the previous administration. I said, 'That is not what you said to the public; you said that there had been an agreement to place Nardello on probation.'

"Mr. Fitzpatrick responded that my effectiveness as First Assistant District Attorney ended the moment I gave the interview to the Inquirer and asked me would we handle this thing in a 'gentlemanly fashion.'

"I said, 'You're the District Attorney, what do you mean?'

"He said, 'I want you to resign.'

"I told Mr. Fitzpatrick that I would not resign, that I had done the correct thing in standing up and relating what the facts were of the Nardello case when he had been making statements that were untrue, and that I would never resign for having done the right thing. This was at approximately 3:40 P.M. on December 5, 1974.

"Mr. Fitzpatrick said, 'You are fired as of 3:30 P.M. today."

The Complaint in the instant action was filed in the District Court on January 29, 1975.

REASONS FOR GRANTING THE WRIT

I. This Court should settle an important question of Constitutional Law and state its view (heretofore specifically reserved) as to the competing considerations involved in applying, and its resolution of a specific question concerning, the balancing test established in *Pickering v. Board of Education*, 391 U.S. 563 (1968), where the dismissed speaker's position in public employment is one in which the relationship between superior and subordinate is of a personal and intimate nature and the content of the speech is both truthful and central to the public employment.

In *Pickering v. Board of Education*, 391 U.S. 563 (1968), this Court indicated "some of the general lines along which an analysis of the controlling interests should run" (*ibid.*, at p. 569) in those instances where the problem was

> ". . . to arrive at a balance between the interests of the [speaker], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees" (*ibid.*, at p. 568).

The Court, however, specifically refused to intimate its view as to how the balance should be struck in a case where the discharged employee's relationship with the superior of whom the employee has been critical is of a certain "personal and intimate nature." This Court said (*ibid.*, at p. 570, ftn. 3):

> "It is possible to conceive of some positions in public employment in which the need for confidentiality is so great that even completely correct public state-

> ments might furnish a permissible ground for dismissal. Likewise, positions in public employment in which the relationship between superior and subordinate is of such a personal and intimate nature that certain forms of public criticism of the superior by the subordinate would seriously undermine the effectiveness of the working relationship between them can also be imagined. We intimate no views as to how we would resolve any specific instances of such situations, but merely note that significantly different considerations would be involved in such cases."

In this case, as Petitioner Sprague's uncontradicted Affidavit recited in the Statement of the Case makes plain, the relationship between himself and Respondent Fitzpatrick was, by virtue of the nature of their respective appointed and elected positions, a personal and intimate one. Further, Mr. Sprague's concededly truthful comments, disclosing the falsity with which Mr. Fitzpatrick had publicly reported on his elected trust to the citizens of the City of Philadelphia, were the cause of his retaliatory dismissal from office. Indeed, the subject matter of Mr. Sprague's public communication and the fact of his employment as a public prosecutor under Respondent Fitzpatrick are inextricably intertwined.

Therefore, it is respectfully suggested that this Court should now state the views, identify the considerations, and strike the balance which it specifically eschewed doing in the quoted *Pickering* footnote.[7]

7. Cf. *Elrod v. Burns*, 424 U.S. 909 (1976).

II. The Court below applied the *Pickering* balancing test in a way which conflicts with that decision, and other decisions of this Court, because it gave ascendancy in striking the balance to the alleged disruptive impact of Petitioner Sprague's statements over their conceded truthfulness, their central significance to the public office to which they related and to the right of the public to be informed as to the conduct of that elective public office.

There is no question that Petitioner's truthful statements concerning Respondent's performance of his duties as District Attorney for the City and County of Philadelphia were a motivating factor,[8] if not the sole factor, in causing Petitioner to be fired summarily from his position as First Assistant District Attorney, a position which he had held for eight and one-half years. Respondent has admitted as much in his Answer (R., p. 20a):

> "Such statements . . . gave the [Respondent] no choice but to terminate the [Petitioner's] employment."

Hence, even on this bare record, Respondent has carried his burden ". . . to show that his conduct was constitutionally protected, and that this conduct was a 'substantial factor'—or, to put it in other words, that it was a 'motivating factor' in the [Respondent's] decision not to [retain] him. . . ." (*Mt. Healthy City School District Bd. of Education v. Doyle*, 45 U.S. Law Week, at p. 4083)

While conceding the statements of Petitioner which give rise to the instant matter to have been both true and Constitutionally protected[9], and while conceding that the sole motivating factor in Petitioner's dismissal from public

8. *Mount Healthy City School District Board of Education v. Doyle*, No. 75-1278, 45 U.S. Law Week 4079 (1977).
9. Compare *Arnett v. Kennedy*, 416 U.S. 134 (1974).

employment was those protected true statements, the Court of Appeals for the Third Circuit, in reliance upon the balancing test first stated in *Pickering v. Board of Education* and its own earlier decision in *Roseman v. Indiana University*, 520 F.2d 1364 (3d Cir., 1975), *cert. denied*, 424 U.S. 921 (1976), has affirmed the District Court's dismissal of Petitioner's Civil Rights Act Complaint saying:

> "The case *sub judice* presents an even more egregious example of disruptive impact [than *Roseman v. Indiana University*, 520 F.2d 1364 (3d Cir. 1975), *cert. denied* 424 U.S. 921 (1976)]. The court below found[10] it 'beyond question' that Sprague's statements had 'totally precluded any future working relationship between him and the defendant . . .' The First Assistant District Attorney—'alter ego' of the District Attorney, his direct administrative and policy-making subordinate—declared in public that his boss had not told the truth. The irreparable breach of confidence between the two men is evidenced by Fitzpatrick's immediate dismissal of Sprague and Sprague's failure to seek reinstatement as a form of relief in this action. *Certainly we could not expect a district attorney to run an efficient office if his first assistant were free to impugn his integrity in public.*
>
> "It is true that Sprague's interview, in contrast to *Roseman's* criticisms, concerned matters of grave public import. But this does not tilt the *Pickering* balance in favor of first amendment protection where, as here, the effectiveness of the employment relationship between employee-speaker and employer-target is so completely undermined. Indeed, the public uproar engendered by Sprague's pronouncements is precisely the factor that so thoroughly curtailed Sprague's usefulness as Fitzpatrick's deputy. *See Arnett v. Kennedy*, 416 U.S. 134, 161 (1974), *citing with approval Meehan*, *supra*, 392 F.2d at 835 (public criticism of superiors can constitute cause for discharge to promote efficiency of service); *Pickering*, *supra*, 391 U.S. at 570 n. 3 (suggesting that public criticism could be grounds for discharge). *Roseman* did not hold that the public importance of an employee's statements automatically created first amendment protection. Instead, that importance may be, *mutatis mutandis*, one of the factors to be weighed in favor of protecting the employee-citizen's right to speak on matters of general concern. *Pickering*, 391 U.S. at 573-74. *The key question under Pickering, however, is whether the employment relationship has been seriously undermined. Id.* at 568-70. If the arousal of public controversy exacerbates the disruption of public service, then it weighs against, not for, first amendment protection in the *Pickering* balance." (Emphasis supplied.)[11]

10. The District Court "found" nothing—the court's judgment was based upon the pleadings and affidavits; there were no findings of fact. See Rule 52, Federal Rules of Civil Procedure.

The District Court, in turn, had decided to dismiss the Complaint because:

> "The practicalities inherent in the superior-subordinate situation presented here dictate that [Respondent's] dismissal of [Petitioner] not give rise to liability under the Civil Rights Act."

No other case can be found in which completely truthful statements were sufficient to permit a dismissal from public employment simply and solely because of their critical or disruptive nature. Indeed, the decision of the court below takes us back to the rejected theory that ". . . public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable . . .", *Keyishian v. Board of Regents*, 385 U.S. 589, 605-606 (1967), and counsel for Respondent so argued before the court below.

11. This reasoning apparently found favor with but two of the judges of the Court of Appeals; the last paragraph of the Court's Opinion contains the following:

> "Chief Judge Seitz concurs in the result because of the particular facts involved. He does so on the understanding that the majority is not holding, in effect, that the disruptive factor tips the scales in all such cases."

So far as the public was concerned, Sprague's statements were of no less Constitutional value than the right to receive pricing information from pharmacists (*Virginia State Board of Pharmacy v. Virginia Citizens' Consumer Council*, 423 U.S. 815 (1976)), or of the right to hear radio broadcasts (*Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1970)) or of the right to receive literature (*Lamont v. Postmaster General*, 381 U.S. 30 (1965)).

As Mr. Justice White wrote for this Court in *Red Lion, supra*, (395 U.S., at p. 395): "It is the purpose of the First Amendment to preserve an uninhibited market place of ideas in which truth will ultimately prevail . . . it is the right of the public to receive suitable access to social, political, aesthetic, moral, and other ideas and experiences which is crucial here."

Indeed, Mr. Justice Marshall's Opinion in *Pickering* lays to rest the pragmatic approach to First Amendment rights espoused by the courts below (391 U.S., at p. 570):

> ". . . to the extent that the [Respondent's] position here can be taken to suggest that even comments on matters of public concern that are substantially correct . . . may furnish grounds for dismissal if they are sufficiently critical in tone, we unequivocally reject it."

III. The application of the *Pickering* balancing test by the Court below conflicts with the application of that same test by the Courts of other Circuits.

The decision of the court below squarely conflicts with the decision of the United States District Court for the District of Maryland in *Hirsch v. Green*, 368 F. Supp. 1061 (D. Md. 1973)[12] There, a Deputy State's Attorney for

12. No appeal was taken from the decision by Chief Judge Northrop. Subsequent activity in the case, not relevant to the issue here, has been reported at 382 F. Supp. 187 (D. Md., 1974).

Baltimore County brought suit against the State's Attorney for Baltimore County seeking, *inter alia*, damages for defendant's termination of plaintiff's employment "in retaliation for [plaintiff's] testimony before a grand jury investigating said defendant's activities" (368 F. Supp., at p. 1062). Plaintiff's complaint was grounded, as is Mr. Sprague's, upon the Civil Rights Act (42 U.S.C. §1983) and the First and Fourteenth Amendments to the United States Constitution.

The Defendant State's Attorney moved to dismiss Plaintiff's Complaint or for summary judgment in his favor. The basis for the Motion was described as follows (368 F. Supp. at p. 1062):

> "Defendant [State's Attorney for Baltimore County] Green concedes that in discharging plaintiff he did not set forth any reasons for the termination, nor did he afford any opportunity for a hearing. He, however, contends that plaintiff was discharged for what might be best summarized as unprofessional conduct. Having discovered that plaintiff had lied to him on prior occasions, defendant concluded that Hirsch had lied again when the grand jury returned an indictment against him. Green also argues that the plaintiff had not been deprived of a vested property right since he served as Deputy State's Attorney at the pl[illegible]ure of the defendant and could be fired at any time. . . ."

Chief Judge Northrop rejected the Motion, explaining his action as follows (368 F. Supp. 25 pp. 1067-68):

> "It is clear that the plaintiff does not have a property interest in his job as Deputy State's Attorney to warrant procedural due process protection. . . ."
>
> • • •
>
> "However, this Court is of the opinion that plaintiff has stated a cause of action under § 1983 with regard

to his first amendment claim. The 'firing' occurred shortly after plaintiff's grand jury testimony and defendant's subsequent indictment. While a public employee may be subject to summary discharge, termination may not be in retribution for the exercise of constitutional rights. Brown v. Hirst, *supra;* Hodgin v. Noland, *supra.* The defendant Green challenges plaintiff's allegations, reciting several factual reasons for the dismissal. Where there is a genuine dispute regarding a free speech claim, summary judgment, without full exploration of the issue, is improper. Wilderman v. Nelson, *supra. The concurrence of protected speech and termination of the employment relationship is enough to invoke an inquiry into the circumstances of that termination.* Chitwood v. Feaster, *supra.* This Court emphasizes that it is not finding that the plaintiff's discharge was in fact the result of the exercise of first amendment rights. All that is being decided here is that the allegations are sufficient to entitle plaintiff to present evidence on this claim at a hearing." (Emphasis supplied.)

The court below permitted Petitioner Sprague's years of public service as a prosecutor to be terminated "in retribution for the exercise of constitutional rights . . . The concurrence of protected speech and termination of the employment relationship [should have been] enough to invoke an inquiry into the circumstances of that termination." [13]

Further, the court below resolved the *Pickering* balance without regard to any standard of burden of proof whereas the Courts of Appeals are seriously divided as to the burden imposed upon a Defendant such as Respondent Fitzpatrick when the Plaintiff has met the initial burden of showing that a motivating factor in his dismissal was

13. See also, e.g., *Illinois State Employees Union Council No. 34, etc.* v. *Lewis,* 473 F.2d 561 (7th Cir., 1972, Stevens, J.), *cert. denied* 410 U.S 943 (1973).

the exercise of First Amendment rights. See, *inter alia, Mancuso v. Taft,* 476 F.2d 187 (1st Cir., 1973); *O'Malley v. Brierley,* 477 F.2d 785 (3d Cir., 1973); *Janetta v. Cole,* 493 F.2d 1334 (4th Cir., 1974); *Smith v. Losee,* 485 F.2d at 339 (5th Cir., 1973), *Smith v. United States,* 502 F.2d 512 (5th Cir., 1974); *Kiiskila v. Nichols,* 433 F.2d 745 (7th Cir., 1970); *Donahue v. Staunton,* 471 F.2d 475 (7th Cir., 1972), *cert. denied,* 410 U.S. 955 (1973); *Buckley v. Coyle Public School System,* 476 F.2d 92 (10th Cir., 1973); *Williams v. Kimbrough,* 295 F. Supp. 578, 585 (W.D. La., 1969), *cert.* denied, 396 U.S. 1061 (1970).

Further, and finally, there is a wide split among the Circuits as to application of the *Pickering* balance with the result that the decisions lack the principled neutrality to be expected in an important area of Constitutional law. That split is summarized, in part at least, in *The Unclear Boundaries of the Constitutional Rights of Public Employees,* 44 University of Missouri (Kansas City) Law Review 389 (1977) as follows (393-394);

". . . The *state* interest has been held sufficient in the following situations: (1) the state's interest in a teacher using class time to teach the subject matter and in maintaining harmonious international relations outweighed plaintiff's right to make a political statement during Air Force English class [*Goldwasser v. Brown,* 417 F.2d 1169 (D.C. Cir. 1969), *cert. denied* 397 U.S. 922 (1970)]; (2) the state's interest in maintaining respect for law outweighed plaintiff probation officer's right to hang poster of fugitives on office wall [*Phillips v. Adult Probation Dept.,* 491 F.2d 951 (9th Cir. 1974)]; (3) state's interest in prohibiting physical intimidation of other employees outweighed plaintiff's right to protest [*Waters v. Peterson,* 495 F.2d 91 (D.C. Cir. 1973)]; (4) state's interest in prohibiting disruptions of office efficiency outweighed plaintiff's right to criticize her department head [*Roseman v. Indiana University,* 520 F.2d 1364 (3rd Cir. 1975)]; (5)

the state's interest in therapy on V.A. psychotherapy ward outweighed plaintiff's right to wear a peace pin [*Smith v. United States*, 502 F.2d 512 (5th Cir. 1974)]; (6) state's interest in school discipline outweighed plaintiff's right to discuss getting the R.O.T.C. off campus during class [*Birdwell v. Hazelwood Sch. Dist.*, 491 F.2d 490 (8th Cir. 1974)]; and (7) the state's interest in harmony among co-workers outweighed plaintiff's right to bicker with and dispute his superior [*Chitwood v. Feaster*, 468 F.2d 359 (4th Cir. 1972)].

"The *speech* interest has prevailed in the following situations: (1) plaintiff's right to protest orally outweighed the state's interest in a peaceful lunch hour for its employees [*Waters v. Peterson*, 495 F.2d 91 (D.C. Cir. 1973)]; (2) plaintiff's interest in criticizing his union and employer outweighed the state's interest in averting some possibility of labor unrest (no unrest shown) [*Holodnak v. Avco Corp.*, 514 F.2d 285 (7th Cir. 1975)]; (3) the plaintiff's interest in working on an underground student newspaper outweighed the state interest in any potential disturbance it could cause [*Bertot v. Sch. Dist. No. 1*, 522 F.2d 1171 (10th Cir. 1975)]; (4) the plaintiff's interest in expression of some opinion on an upcoming tenant's election outweighed the state's interest in preserving the appearance of impartiality [*Alderman v. Phila. Hsg. Auth.*, 496 F.2d 164 (3rd Cir. 1974), *cert. denied* 419 U.S. 844 (1974)]; (5) the plaintiff's interest in complaining about a seniority system outweighed the state's interest in maintaining higher morale [*Janetta v. Cole*, 493 F.2d 1334 (4th Cir. 1974)]; (6) the plaintiff's interest in supporting a candidate in an election, and in questioning and opposing the administration in his position as head of faculty association outweighed the state's interest in harmony and efficiency [*Smith v. Losee*, 485 F.2d 334 (10th Cir. 1973), *cert. denied* 417 U.S. 908 (1974)]; (7) the plaintiff's interest in criticizing his employer outweighed the state's interest, especially since there was no evidence of a negative result [*Donahue v. Staunton*, 471 F.2d 475 (7th Cir. 1972), *cert. denied* 410 U.S. 955 (1973)]; (8) the plaintiff's interest

in expression by a silent refusal to salute the flag outweighed the state's interest in maintaining a healthy respect for the flag in students [*Russo v. Central Sch. Dist.*, 469 F.2d 623 (2d Cir. 1972, *cert. denied* 411 U.S. 932 (1973)]; (9) the plaintiff's expression of opinion by wearing a black armband outweighed the state's interest in avoiding any appearance of non-objectivity, and of their undifferentiated fear of disturbance [*James v. Bd. of Education*, 461 F.2d 566 (2d Cir. 1972), *cert. denied* 409 U.S. 1042 (1972). *See also Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503 (1969) where the Supreme Court held that neither the unfulfilled fear of disruption nor the mere desire to avoid the discomfort and unpleasantness which accompanies an unpopular view is sufficient to outweigh the students' right to wear a black armband as an expression of opinion]; (10) the plaintiff's interest in having a bumper sticker on his car outweighed the state's interest in limiting the partisan political activity of its employees [*Hobbs v. Thompson*, 448 F.2d 456 (5th Cir. 1971]; (11) the plaintiff's interest in leafletting outweighed the state's interest in an unsupported fear of effect on military discipline [*Kiiskila v. Nichols*, 433 F.2d 745 (7th Cir. 1970)]."

CONCLUSION

For the reasons set forth above, Petitioner respectfully prays that this Court issue its Writ of Certiorari directed to the United States Court of Appeals for the Third Circuit so as to bring before it for briefing, argument and decision the important questions of federal constitutional law presented by the instant Petition.

Respectfully submitted,

/s/ Thomas B. Rutter
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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 76-1266

RICHARD A. SPRAGUE,
Appellant,

v.

F. EMMETT FITZPATRICK, JR.,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

D.C. Civil Action No. 75-231

Argued October 19, 1976

Before SEITZ, *Chief Judge*, HUNTER and GARTH, *Circuit Judges*

Thomas B. Rutter
Attorney for Appellant

James E. Beasley
Jeffrey M. Stopford
Beasley, Hewson, Casey, Colleran & Stopford
Attorneys for Appellee

(Filed December 6, 1976)

HUNTER, *Circuit Judge:*

Richard A. Sprague, former First Assistant District Attorney of Philadelphia County, appeals from the dismissal

of his action for damages against F. Emmett Fitzpatrick, District Attorney of Philadelphia County. Treating the dismissal below as a summary judgment for defendant Fitzpatrick, we affirm.

I.

The material facts are not in dispute. Fitzpatrick took office as District Attorney in 1973. Sprague, who had been First Assistant District Attorney under Fitzpatrick's predecessor, agreed to remain in that position. The First Assistant is the District Attorney's "alter ego." He assists the District Attorney in formulating policy, is primarily responsible for administration on a daily basis, keeps the District Attorney informed about the performance of the various units in the office, and acts in the District Attorney's place when the latter is unavailable. In short, the First Assistant is the District Attorney's second-in-command.

In 1974, the District Attorney's office was working on post-trial motions concerning the sentencing of Joseph Nardello. Nardello, who had a long criminal record, had been convicted of receiving stolen goods in 1969. Since 1969, Sprague and his subordinates had repeatedly sought to recommend a 2½ to 5 year prison sentence for Nardello, but the argument on post-trial motions was repeatedly delayed. In July of 1974, Fitzpatrick interceded in the Nardello case. He personally appeared before Nardello's sentencing judge and recommended probation.

After it was discovered that Fitzpatrick had represented Nardello's co-defendant on a federal blackmail charge before leaving private practice, journalists began to inquire about the Nardello matter. Fitzpatrick denied responsibility for the decision to recommend probation for Nardello. Three times he attributed the recommendation to various

subordinates who had worked on the case; once he referred to an agreement, supposedly worked out under his predecessor, not to recommend a jail term for Nardello.

A reporter for the Philadelphia Inquirer asked Sprague to comment on Fitzpatrick's public disclaimers. Sprague sharply disputed the truth of each. This interview was published on December 4, 1974, and on December 5, Fitzpatrick demanded Sprague's resignation. When Sprague refused. Fitzpatrick discharged him.

Sprague filed an action for damages of $500,000 against Fitzpatrick in the United States District Court for the Eastern District of Pennsylvania. He alleged that the District Attorney's decision to discharge him because of the exercise of his rights under the first and fourteenth amendments amounted to a deprivation of his constitutional rights in violation of 42 U.S.C. § 1983.[1] Jurisdiction was founded on 28 U.S.C. § 1343(3).[2]

Fitzpatrick moved to dismiss. He contended under Fed. R. Civ. P. 12(b)(6) that the District Attorney was immune from suit under section 1983 and that Sprague had therefore failed to state a claim upon which relief could be granted. Under Fed. R. Civ. P. 12(b)(1), he averred that the suit was actually against the City of Philadelphia, which is not a "person" within the meaning of section

1. Section 1983 reads as follows:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

2. Section 1343(3) reads as follows:

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

. . . (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by an Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States . . . .

1983, and that the court therefore lacked jurisdiction over the subject matter.

On April 3, 1975, the court denied Fitzpatrick's motion and ordered him to file an answer. It also ordered both parties to file affidavits pertaining to their official relationship and the facts surrounding Sprague's discharge. They complied.

Although the record is unclear on the point, the district court apparently then decided, *sua sponte*, to reconsider its denial of Fitzpatrick's motion to dismiss. On July 25, 1975, the court directed the parties to appear and argue the relevance of *Pickering v. Board of Education*, 391 U.S. 563 (1968), to that motion. Fitzpatrick had not renewed his motion to dismiss, but the court stayed plaintiff's discovery motions pending a ruling on dismissal. Evidently, both parties considered the motion to dismiss still before the court, for no objection was raised to this procedure.

On January 9, 1976—nearly six months after announcing its reconsideration of the dismissal motion—the court dismissed the complaint. It rejected Fitzpatrick's claim of prosecutorial immunity, but found that *Pickering* and its progeny foreclosed a finding of liability in this case. It then grounded its dismissal on lack of jurisdiction over the subject matter.

II.

The procedural posture of this case is highly unusual. It is clear that 28 U.S.C. § 1343(3) conferred upon the district court jurisidction over the subject matter of Sprague's action. He alleged a deprivation under color of state law of his constitutional rights—the plain object of section 1343(3). Moreover, once the court rejected Fitzpatrick's

assertion of prosecutorial immunity, it should have been clear that Sprague had stated a claim upon which relief could be granted. *See, e.g., Pickering, supra; Roseman v. Indiana University*, 520 F.2d 1364 (3d Cir. 1975), *cert. denied*, 424 U.S. 921 (1976).

The procedure followed by the court was actually a dismissal for failure to state a claim under Fed. R. Civ. P. 12(b)(6), which—because matters outside the pleadings had been presented to the court—was transformed into a summary judgment under Fed. R. Civ. P. 56.[3] 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE § 1266 (1969). Fitzpatrick did not formally renew his motion to dismiss under rule 12(b)(6), but both the plaintiff and the court treated it as though it were still pending. There was no disputed issue of material fact, and both parties clearly acquiesced in the court's decision to consider the legal issues in the case. Sprague does not contend that this decision was error. Moreover, he waived any error when he failed to object to the court's decision to treat the motion as still pending. Fed. R. Civ. P. 46.

In reconsidering the motion to dismiss, the court considered matters outside the pleadings, thereby converting the dismissal into a grant of summary judgment pursuant to rule 12(b)(6). *Central Contracting Co. v. Maryland Casualty Co.*, 367 F.2d 341, 343 (3d Cir. 1966). No point

3. Rule 12(b) reads in pertinent part as follows:

Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsible pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:

. . . (6) failure to state a claim upon which relief can be granted . . . . If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

would be served by remanding simply to permit the parties or the court to renew and relabel the various motions or orders; therefore, we will accept the view of the parties that the dismissal was, in effect, a summary judgment for defendant.[4] *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 357 n.4 (1959).

III.

Fitzpatrick insists that the district court improperly rejected his claim of prosecutorial immunity under section 1983. We note that this immunity has not yet been extended to "those aspects of the prosecutor's responsibility that cast him in the role of an administrator or investigative officer rather than that of advocate." *Imbler v. Pachtman*, 424 U.S. 409, 430-31 (1976); *see id.* at 431 n.33. But Fitzpatrick maintains that prosecutorial immunity should be held to cloak administrative actions such as the discharge involved here. The hiring and firing of the subordinates through whom he acts, says Fitzpatrick, is the District Attorney's ultimate discretionary act in his service to the public; therefore, such decisions ought to repose within the safe harbor of section 1983 immunity.

We need not resolve that thorny issue in this case. Assuming, without deciding, that the district court correctly held defendant Fitzpatrick's administrative action outside the scope of prosecutorial immunity, we nevertheelss affirm the summary judgment for defendant. We do so on the basis of *Pickering* and *Roseman*.

4. Other observers have commented as follows on this issue:

> . . . [I]f the record clearly presents the issue as to whether summary judgment sohuld be entered and both parties have had a reasonable opportunity to present affidavits and other evidence, for the sake of judicial economy appellate courts generally will make an immediate determination of the issue rather than remanding the cases to the district court for disposition.

5 C. Wright & A. Miller, Federal Practice & Procedure ¶ 1266, at 680 n.67 (1969).

In *Pickering*, a high school teacher wrote a letter to a local newspaper criticizing the way the school board and the superintendent had handled recent bond issues. The board held a hearing and determined that many of the statements in Pickering's letter were false. It found his action detrimental to the opeartion of the public schools and dismissed him. Illinois courts affirmed Pickering's dismissal. 391 U.S. 565-68.

The Supreme Court reversed, holding that the board's action violated Pickering's right of free speech. As the *Pickering* court saw it, the problem was to strike a balance between the interest of the public employee as a citizen and that of the state in promoting efficient performance of its employees. *Id.* at 568. Because of the infinite variety of situations in which such cirticism could arise, however, the Court refused to establish a bright-line test for protected speech in the public employee context. *Id.* at 569. Instead, it adopted a balancing test, weighing the employee's interest in free speech against the harm likely to result to the state's provision of service. The crucial variant in this balance appears to have been the hierarchial proximity of the criticizing employee to the person or body criticized. The court noted that the

> statements are in no way directed towards any pesron with whom appellant would normally be in contact in the course of his daily work as a teacher. Thus no question of maintaining either discipline by immediate superiors or harmony among coworkers is presented here. Appellant's employment relationships with the Board and, to a somewhat lesser extent, with the superintendent are not the kind of close working relationships for which it can be persuasively claimed that personal loyalty and confidence are necessary to their proper functioning.

Id. at 569-70. The Court also observed that "significantly different considerations would be involved" in cases where "the relationship between superior and subordinate is of such a personal and intimate nature that certain forms of public criticism of the superior by the subordinate would seriously undermine the effectiveness of the working relationship between them." *Id.* at 570 n.3. Several cases have dealt with such disruptive statements and found them outside first amendment protection. *See, e.g., Clark v. Holmes,* 474 F.2d 928 (7th Cir.), *cert. denied,* 411 U.S. 972 (1973); *Duke v. North Texas State University,* 469 F.2d 829 (5th Cir.), *cert. denied,* 412 U.S. 932 (1973). *See also Meehan v. Macy,* 393 F.2d 822, *modified,* 425 F.2d 469, 471, *aff'd en banc,* 425 F.2d 472 (D.C. Cir. 1968) (remanding for reconsideration in light of *Pickering,* but indicating that on present state of evidence employee's speech was unprotected).

This court applied the *Pickering* balancing test in *Roseman.* Roseman, an associate professor at Indiana University, had criticized the acting chairman of her department's teaching staff. One week later, the university decided not to renew her contract. We affirmed the district court's holding that Roseman's statements "were not protected by the First Amendment, and therefore might permissibly form part of the basis" of her discharge. 520 F.2d at 1367. We noted first that Roseman's statements did not rise to the level of public importance present in *Pickering. Id.* at 1368. Second, the crucial element of disruptive impact, absent in *Pickering,* appeared in *Roseman.*

> Pickering's attacks were on a remote superintendent and school board; in contrast, Roseman's called into question the integrity of the person immediately in charge of running a department which, it is fair to assume, was more intimate than a school district. The district court found that "plaintiff's attacks upon Faust's integrity in a faculty meeting would undoubtedly have the effect of interfering with harmonious relationships with plaintiff's superiors and co-workers." 382 F. Supp. at 1339. In making this finding, the district court reflected a similar concern expressed by the Supreme Court, which noted that Pickering's statements were "in no way diercted towards any person with whom [Pickering] would normally be in contact in the course of his daily work as a teacher." Pickering, supra at 569-70. Because of this, Pickering's case raised "no question of maintaining either discipline by immediate superiors or harmony among coworkers." Id. at 570. The same obviously cannot be said of Roseman's faculty meeting accusations directed at the Acting Chairman of her Department.

Id. at 1368-69 (footnote omitted).

The case *sub judice* presents an even more egregious example of disruptive impact. The court below found it "beyond question" that Sprague's statements had "totally precluded any future working relationship between him and the defendant . . . ." The First Assistant District Attorney—"alter ego" of the District Attorney, his direct administrative and policy-making subordinate—declared in public that his boss had not told the truth. The irreparable breach of confidence between the two men is evidenced by Fitzpatrick's immediate dismissal of Sprague and Sprague's failure to seek reinstatement as a form of relief in this action. Certainly we could not expect a district attorney to run an efficient office if his first assistant were free to impugn his integrity in public.

It is true that Sprague's interview, in contrast to Roseman's criticism's, concerned matters of grave public import

But this does not tilt the *Pickering* balance in favor of first amendment protection where, as here, the effectiveness of the employment relationship between employee-speaker and employer-target is so completely undermined. Indeed, the public uproar engendered by Sprague's pronouncements is precisely the factor that so thoroughly curtailed Sprague's usefulness as Fitzpatrick's deputy. *See Arnett v. Kennedy*, 416 U.S. 134, 161 (1974), *citing with approval Meehan, supra*, 392 F.2d at 835 (public criticism of superiors can constitute cause for discharge to promote efficiency of service); *Pickering, supra*, 391 U.S. at 570 n.3 (suggesting that public criticism could be grounds for discharge). *Roseman* did not hold that the public importance of an employee's statements automatically created first amendment protection. Instead, that importance may be, *mutatis mutandis*, one of the factors to be weighed in favor of protecting the employee-citizen's right to speak on matters of general concern.[5] *Pickering*, 391 U.S. at 573-74. The key question under *Pickering*, however, is whether the employment relationship has been seriously undermined. *Id.* at 568-70. If the arousal of public contorversy exacerbates the disruption of public service, then it weighs against, not for, first amendment protection in the *Pickering* balance.

For the foregoing reasons, the judgment of the district court will be affirmed.

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5. In *Pickering*, the Supreme Court held that since the subject matter of the communications was only tangentially related to "the fact of employment," i.e., since Pickering's knowledge and views about the use of school funds did not depend on his relationship to the school board, the public importance of the statements meant that the state employer could not punish him for making them. 391 U.S. at 573-74. In this case, however, the fact of Sprague's employment is inextricably intertwined with his knowledge and views about Fitzpatrick's performance as District Attorney. Sprague cannot claim to be treated, for purposes of that issue, as a mere "member of the general public," as Pickering could with respect to school bonds.

Chief Judge Seitz concurs in the result because of the particular facts involved. He does so on the understanding that the majority is not holding, in effect, that the disruptive factor tips the scales in all such cases.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX B

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RICHARD A. SPRAGUE

v.

F. EMMETT FITZPATRICK, JR.

CIVIL ACTION
No. 75-231

OPINION

DITTER, J.

January 9, 1976

The principal question presented by this case is whether a district attorney's firing of his first assistant for publicly criticizing him presents a colorable claim under the Civil Rights Act of 1871, 42 U.S.C. §1983. Two cases—one emanating from the United States Supreme Court and the other from the Court of Appeals for this Circuit—persuade me that it does not. The complaint accordingly will be dismissed.[1]

Taking as true the allegations of the complaint, *Cooper v. Pate*, 378 U.S. 546, 84 S. Ct. 1733, 1734 (1964), and all reasonable inferences deductible therefrom, *Curtis v. Everette*, 489 F. 2d 516, 518 (3d Cir. 1973), cert. denied,

1. By an order dated April 3, 1975, I denied defendant's motion to dismiss plaintiff's amended complaint, see note 5 infra, or in the alternative to require plaintiff to file a more specific complaint. As a result, however, of information revealed in the affidavits made in response to the same order, and in light of the decision of the Court of Appeals for the Third Circuit in *Roseman v. Indiana University of Pennsylvania, at Indiana*, 520 F. 2d 1364 (3d Cir. 1975), I exercised my inherent authority to reexamine the propriety of this court's jurisdiction, see, e.g., *Mansfield Coldwater & Lake Michigan Ry. v. Swan*, 111 U.S. 379, 4 S. Ct. 510 (1884); *Observa-Dome Laboratories, Inc. v. McGraw-Hill, Inc.*, 343 F. Supp. 1030 (E.D. Pa. 1972), ordered reargument on the jurisdictional question, and now conclude that the complaint cannot stand.

416 U.S. 995, 94 S. Ct. 2409 (1974), the operative facts[2] appear to be as follows. Plaintiff Richard A. Sprague was first employed by the City of Philadelphia as an assistant district attorney in February. 1958, and served as first assistant district attorney[3] from June, 1966, through December, 1974. The defendant, F. Emmett Fitzpatrick, was elected district attorney in the November, 1973, general election, and in January, 1974, reaffirmed the designation of plaintiff as first assistant.

Some months later a public controversy arose concerning a series of statements made by the district attotrney to the news media regarding the imposition of probation on a criminal defendant whom he allegedly had represented while privately engaged in the practice of law. Essentially, Sprague contends that in these statements Fitzpatrick variously attributed the recommendation of probation to evaluations of the case made by two assistant district attorneys and to an agreement struck by his predecessor and the accused. Sprague further avers he "knew" that defendant's statements were untruthful and when one of the major Philadelphia daily newspapers sought him out asking specific questions concerning Fitzpatrick's comments, he recounted his understanding of how Fitzpatrick had come to recommend probation. The newspaper inter-

2. My order of April 3, 1975, referred to in note 1 supra, directed in part that

> each party file one or more affidavits pertaining to the official relationship between them, the facts pertaining to plaintiff's dismissal and any other relevant facts as to whether a valid cause of action exists . . .

3. In his complaint, plaintiff alleges that the designation of first assistant district attorney exists pursuant to the County Code, Act of August 9, 1955, P.L. 323, 16 P.S. §1421. While this once indeed was correct, the Pennsylvania Constitution was amended in 1961 to abolish all county offices in Philadelphia, including that of the district attorney, and grant all power to the city under its Home Rule Charter Amendment of November 6, 1961, Article XIV, §8, as amended, Pennsylvania Constitution, Article IX, §13. See also *Commonwealth ex rel. Specter v. Moak*, 452 Pa. 482, 307 A.2d 884 (1973).

view appearing the next day quoted Sprague as disputing *seriatim* Fitzpatrick's prior statements to the news media.[4]

On the day following the publication of plaintiff's newspaper interview, the parties met, at Fitzpatrick's behest, in his office. The outcome of that meeting was defendant's request that Sprague resign, plaintiff's refusal to do so, and defendant's dismissal of plaintiff from his post effective as of that date.

Plaintiff subsequently instituted this action, alleging that defendant's termination of his employment constituted a violation of his freedom of speech as guaranteed by the First and Fourteenth Amendments and protected by the Civil Rights Act.[5] Although technically this opinion is dispositive of the court's sua sponte inquiry into its subject matter jurisdiction, see note 1 *supra*, the issue which is ultimately controlling was raised by defendant in each of his motions to dismiss, see note 5, *supra*.

At the outset, I shall discuss briefly why Mr. Fitzpartick's other arguments are insufficient to justify dismissal of the complaint.[6] Fairly stated, defendant's first contention[7] is

4. See The Philadelphia Inquirer, December 4, 1974, 1A, 14A.

5. Defendant moved to dismiss plaintiff's original complaint on the ground that because of the allegation "that defendant had acted solely in his official capacity," Mr. Fitzpatrick was immune from suit and this court lacked jurisdiction over the subject matter. Apparently recognizing that the latter argument at least was not without some merit, see *O'Brien v. Galloway*, 362 F. Supp. 901 (D. Del. 1973); cf. *United States ex rel. Gittlemacker v. Philadelphia*, 413 F.2d 84 (3d Cir. 1969), before this court had an opportunity to act upon defendant's motion, plaintiff filed an amended complaint, alleging that defendant's actions occurred "in his individual capacity under color of state law." Defendant thereafter moved to dismiss the amended complaint or in the alternative to require plaintiff to file a more specific complaint, which motion I denied in my aforementioned order of April 3, 1975, see notes 1 and 2 supra.

6. That dismissal of a complaint prior to the reception of any evidence either by affidavits or admission is judicially disfavored seems clear. See *Scheuer v. Rhodes*, 416 U.S. 232, 94 S. Ct. 1683 (1974). In this case, however, I not only have had the benefit of the parties' affidavits, but also the carefully researched briefs of counsel and two oral arguments.

7. A curious contention, raised by plaintiff for the first time in his memorandum of law in opposition to defendant's motion to dismiss the amended

that since he was acting as district attorney[8] at the time of the acts alleged in the indictment, he is immune from suit. In *Bowers v. Heisel*, 361 F. 2d 581 (3d Cir. 1966), cert. denied, 386 U.S. 1021, 87 S. Ct. 1367 (1967), the Court of Appeals for this Circuit held that prosecuting attorneys should enjoy the same immunity as is afforded members

complaint, is that defendant's attorney, James E. Beasley, Esquire, lacks authority to represent Mr. Fitzpatrick. In support of this remarkable claim, plaintiff cites portions of the Philadelphia Home Rule Charter and Pennsylvania statutes. Section 8-410 of the Home Rule Charter provides:

> Whenever any officer, department, board or commission shall require legal advice concerning his or its official business or whenever any legal question or dispute arises or litigation is commenced or to be commenced in which any officer, department, board or commission is officially concerned or whenever any taxes or other accounts of whatever kind due the City remain overdue and unpaid for a period of ninety days it shall be the duty of such officer, department, board or commission, to refer the same to the Law Department.
>
> • • •

And Section 1 of the Act of December 17, 1970, 71 P.S. §192, states:

> It shall be unlawful for any officer, department, board or commission to engage any attorney to represent him or it in any manner or thing relating to his or its public business without the approval in writing of the City Solicitor.

Were I sitting in a state court, or were Pennsylvania law controlling here, it might be necessary to consider this question at some length. In view of my disposition of the case—on the motion of the court, see note 1 supra—I need not decide whether under these circumstances private counsel properly may represent the district attorney.

Another challenge to the motion to dismiss—on the ground that it was filed and served in disregard of the applicable federal and local rules of procedure —was abandoned at the first oral argument.

8. A substantial split of authority exists on the question of whether the Philadelphia district attorney is an official of the city or the Commonwealth. See *Duggan v. 807 Liberty Ave.*, 447 Pa. 281, 288 A.2d 750 (1972); *Commonwaelth ex rel. Specter v. Bauer*, 437 Pa. 37, 261 A.2d 573 (1970); *Chalfin v. Specter*, 426 Pa. 464, 233 A.2d 562 (1967); *Commonwealth ex rel. Specter v. Martin*, 426 Pa. 102, 232 A.2d 729 (1967); *Commonwealth ex rel. Specter v. Freed*, 424 Pa. 508, 228 A.2d 302 (1967); see also *Commonwealth ex rel. Specter v. Moak*, 452 Pa. 482, 307 A.2d 884 (1973).

A close reading of these decisions suggests that the status of the Philadelphia district attorney as an official of the city or Commonwealth depends both upon the purpose for which the question is being asked and the composition of the Pennsylvania Supreme Court at the time the question is posed.

Notwithstanding its inconsistency concerning the status of the office of district attorney in Philadelphia, the Supreme Court of Pennsylvania has unanimously held that all *assistant* district attorneys are employees of the city. See *Comonwealth ex rel. Specter v. Moak*, supra.

of the judiciary.[9] The court hastened to add, however, that the immunity of a prosecutor is not unlimited, but rather extends only to acts he performs within the authority and jurisdiction of his office. 361 F.2d at 590-91. By the time the Court of Appeals decided *Cambist Films, Inc. v. Duggan*, 475 F. 2d 887 (3d Cir. 1173), almost seven years after *Bauers v. Heisel, supra*, its views on prosecutorial immunity had been considerably sharpened and refined. In its per curiam opinion in *Cambist Films, supra*, the court stated:

> It is [sic] generally settled principle of law that a district attorney is a "quasi-judicial officer," Commonwealth, ex rel. Specter v. Martin, 426 Pa. 102, 232 A. 2d 729 (1967), and in the performance of duties imposed on him by law, he cannot be subjected to personal liability through a common law action. Pennsylvania law has [sic], as a general principle, that quasi-judicial officers cannot be subjected to liability, civil or criminal, for any of their judicial acts, no matter how erroneous, so long, as they act in good faith. McNair's Petition, 324 Pa. 48, 187 A. 498 (1936). See discussion 63 Am. Jur. 2d §289. Federal courts have similarly held. See Bauers v. Heisel, 361 F. 2d 581 (3 Cir. 1966). Cambist here refers to the language in Bauers v. Heisel which implied that not all acts of a district attorney should be immune. That case stated that "° ° ° the immunity of a prosecutor, however, is not without limitation; it is not absolute. The immunity of judges, from which immunity of prosecutors is derivative, does not extend to acts which are clearly outside their jurisdiction" This discussion in

9. See also *Bethea v. Reid*, 445 F.2d 1163 (3d Cir. 1971), cert. denied, 404 U.S. 1061, 92 S. Ct. 747 (1972); *Cambist Films, Inc. v. Duggan*, 475 F.2d 887 (3d Cir. 1973); *Turack v. Guido*, 464 F.2d 535 (3d Cir. 1972); *United States v. ex rel. Moore v. Koelzer*, 457 F.2d 892 (3d Cir. 1972).

> Heisel pertains to cases involving alleged violations of the Civil Rights Act, not common law tort actions. In such cases Heisel recognized a distinction that needs be observed between excess of jurisdiction, a circumstance which would not allow liability, as opposed to the clear absence of all jurisdiction over the subject matter, which could result in liability for the judicial official in Civil Rights circumstances. Robichaud v. Ronan, 351 F. 2d 533 (9 Cir. 1965); Lewis v. Brautigam, 227 F. 2d 124 (5 Cir. 1955). Even considering the possible civil rights problem here, no liability can be attributed to the prosecutor in our present case because he was not acting where he clearly had no jurisdiction. He was investigating an alleged violation of the laws of Pennsylvania, which was within his powers and duties, and the actions which he proscribed in this instance were such as he felt necessary to the enforcement of those laws. Obviously, this case in no way approaches the "clear absence of jurisdiction" standard required for possible liability on the part of the prosecutor.

475 F. 2d at 888-89.[10]

The question here, then, is whether defendant solely by virtue of his status as a quasi-judicial officer, is immune from suit under Section 1983 for his actions in the capacity of an employer. I think quite clearly he is not, and I so hold today. The traditional considerations advanced in support of the doctrine of quasi-judicial immunity, see

10. Other courts have perhaps somewhat more jealously guarded the breadth of the immunity with which they are willing to cloak a prosecutor, especially where he strays across the often ill-defined line between quasi-judicial functions and police functions. See, e.g., *Apton v. Wilson*, 506 F.2d 83 (D.C. Cir. 1974); *Weathers v. Ebert*, 505 F.2d 514 (4th Cir. 1974); *Robichaud v. Ronan*, 351 F.2d 533 (9th Cir. 1973).

Bauers v. Heisel, supra, 361 F. 2d at 589-90,[11] do not demand, and the "well settled proposition that the employment of a public employee may not, in general, be terminated for [the] exercise of constitutionally protected rights," *Leslie v. Philadelphia 1976 Bicentennial Corporation,* 343 F. Supp. 768, 769 (E.D. Pa. 1972),[12] will not tolerate the wholesale immunity claimed by defendant.

Defendant's second argument—that the amended complaint should be dismissed for lack of specificity—is devoid of merit. It is, of course, the rule in this circuit that Section 1983 actions must be specifically pleaded in order to withstand a motion to dismiss, *Kauffman v. Moss,* 420 F. 2d 1270, 1275 & n. 13 (3d Cir.), cert. denied, 400 U.S. 846, 91 S. Ct. 93 (1970); *Negrich v. Hohn,* 379 F. 2d 213, 215 (3d Cir. 1967),[13] and that broad, conclusory allegations, unsupported by specific factual contentions, are insufficient to state a claim upon which relief may be granted, *id.*[14]

11. There the court stated:
[W]e believe that both reason and precedent require that a prosecuting attorney should be granted the same immunity as is afforded members of the judiciary. The reasons are clear: his primary responsiblity is essentially judicial—the prosecution of the guilty and the protection of the innocent, Griffin v. United States, 295 F. 437, 439-440 (C.A. 3, 1924); his office is vested with a vast quantum of discretion which is necessary for the vindication of the public interest. In this respect, it is imperative that he enjoy the same freedom and independence of action as that which is accorded members of the bench. This reasoning is nearly as well established in Anglo-American law as judicial immunity itself [footnote omitted].

12. See, e.g., *Perry v. Sindermann,* 408 U.S. 593, 92 S. Ct. 2694 (1972); *Pickering v. Board of Education,* 391 U.S. 563, 88 S. Ct. 1731 (1968); *Keyishian v. Board of Regents,* 385 U.S. 589, 87 S. Ct. 765 (1967); *Shelton v. Tucker,* 364 U.S. 479, 81 S. Ct. 247 (1960); *Wieman v. Updegraff,* 344 U.S. 183, 73 S. Ct. 215 (1952); *Commonwealth of Pennsylvania ex rel. Rafferty v. Philadelphia Psychiatric Center,* 356 F. Supp. 500 (E.D. Pa. 1973).

13. See also *Scott v. University of Delaware,* 385 F. Supp. 937, 944 (D. Del. 1974); *Salvati v. Dale,* 364 F. Supp. 691, 700 (W.D. Pa. 1973); cf. *Pugliano v. Staziak,* 231 F. Supp. 347, 349 (W.D. Pa. 1964), aff'd, 345 F.2d 797 (3d Cir. 1965).

14. See also *Scott v. University of Delaware,* supra at 944; *Salvati v. Dale,* supra at 700; *Buszka v. Johnson,* 351 F. Supp. 771, 773 (E.D. Pa. 1972); *Mason v. Delaware County,* 331 F. Supp. 1010, 1017 (E.D. Pa. 1971); *Johnson v. Kreider,* 264 F. Supp. 188 (M.D. Pa. 1967); *Wagner v. Maroney,* 263 F. Supp. 377, 378 (W.D. Pa. 1967).

It is plain, however, from even a cursory reading of the amended complaint, and from the fact that defendant understood the assertions to such an extent that he was able to identify the decisional authority which support them,[15] that the pleading in question easily satisfies the specificity requirement.

The ground upon which I conclude that the complaint must be dismissed was first raised by Mr. Justice Marshall in a footnote in *Pickering v. Board of Education,* 391 U.S. 563, 88 S. Ct. 1731 (1968). *Pickering* involved a high school teacher who was discharged for writing a letter to local newspapers in connection with a proposed tax increase. In his letter he had criticized the manner in which the board of education and the district superintendent of schools had handled prior proposals for raising revenue for the schools. *Id.* at 564, 88 S. Ct. at 1732-33. The Court found that some statements in Pickering's letter were true, some although not malicious were false,[16] but all fell within the protection of the First Amendment. *Id.* at 572-74, 88 S. Ct. at 1736-38.

15. See Memorandum in Support of [defendant's first] Motion to Dismiss, Document No. 5, 4-5.

16. The Court specifically held that absent proof of false statements knowingly and recklessly made by Pickering, his exercise of his right to speak on issues of public importance could not furnish the basis for his dismissal from public employment. *Pickering v. Board of Education,* 391 U.S. 563, 574, 88 S. Ct. 1731, 1738 (1968). See also *Cantrell v. Forest City Publishing Co.,* 418 U.S. 909, 95 S. Ct. 465, 470 (1974); *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 94 S. Ct. 2997 (1974); *Curtis Publishing Co. v. Britts,* 388 U.S. 130, 87 S. Ct. 1975 (1967); *Time, Inc. v. Hill,* 385 U.S. 374, 87 S. Ct. 534 (1967); *New York Times Co. v. Sullivan,* 376 U.S. 254, 84 S. Ct. 710 (1964).
Defendant has nowhere, either in his affidavit or in the various documents filed by his attorney, characterized plaintiff's statements as made recklessly in disregard of the truth. Rather he has stated that
> [W]hile the subject he chose to comment upon involved a difference of opinion concerning the prosecution of one case, I have little doubt that his open challenge to my authority was intended to enable him to return to the position of unfettered power he enjoyed under the previous administration.

Affidavit in Support of Defendant's Motion to Dismiss Amended Complaint (Document No. 13) 4.

With respect to the possible impact of Pickering's letter upon the context of an ongoing employer-employee relationship, the Court stated:

> The statements are in no way directed towards any person with whom appellant would normally be in contact in the course of his daily work as a teacher. Thus no question of maintaining either discipline by immediate superiors or harmony among coworkers is presented here. Appellant's employment relationships with the Board, and to a somewhat lesser extent, with the superintendent are not the kind of close working relationships for which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning.

Id. at 569-70, 88 S. Ct. at 1735. Then, in a footnote pregnant with implications for the case at bar, the court said:

> It is possible to conceive of some positions in public employment in which the need for confidentiality is so great that even completely correct public statements might furnish a permissible ground for dismissal. Likewise, positions in public employment in which the relationship between superior and subordinate is of such a personal and intimate nature that certain forms of public criticism of the superior by the subordinate would seriously undermine the effectiveness of the working relationship between them can also be imagined. We intimate no views as to how we would resolve any specific instances of such situations, but merely note that significantly different considerations would be involved in such cases.

Id. at 570 n.3, 88 S. Ct. at 1735 n. 3. This chord was echoed by Mr. Justice Rehnquist who, writing for the

plurality in *Arnett v. Kennedy*, 416 U.S. 134, 160-61, 94 S. Ct. 1633, 1647 (1974), cited *Pickering* for the proposition that "in certain situations the discharge of a government employee may be based on his speech without offending guarantees of the First Amendment." [17]

Prior to *Roseman v. Indiana University of Pennsylvania, at Indiana*, 520 F.2d 1364 (3rd Cir. 1975), little had been said in the way of decisional authority concerning precisely what the "significantly different considerations" alluded to in *Pickering* might be. One circuit judge suggested that such factors might include "the need for loyal and sympathetic employees [18] in positions of discretion," [19] the need to ensure obedience to state policy, and the need to prevent impropriety or its appearance." *Nunnery v. Barber*, 503 F.2d 1349, 1361 (4th Cir. 1974) (Butzner, J., dissenting). [20]

17. The factual situation in *Arnett* admittedly was markedly different than that in the case at bar. Kennedy was a nonprobationary federal employee who contended that his dismissal from the Office of Economic Opportunity constituted a denial of due process and an infringement of his right to freedom of speech. In reversing a judgment of a three judge district court for the plaintiff, a plurality of the Supreme Court held, *inter alia*, that the Lloyd-LaFollette Act, 5 U.S.C. §7501, which authorizes removal or suspension of nonprobationary federal employees "for such cause as will promote the efficiency of the service" is intended to permit dismissal for speech as well as for other conduct. *Arnett v. Kennedy*, 416 U.S. 134, 162, 94 S. Ct. 1633, 1647 (1974).

18. Neither party has asserted, nor does the record suggest, that plaintiff's was what traditionally has been regarded as a political patronage position, or that his discharge might be termed a patronage dismissal. For a discussion of the considerations which would come into play in the context of a patronage discharge, see, e.g., *Illinois State Employees Union Council 34, American Federation of State, County and Municipal Employees, AFL-CIO v. Lewis*, 473 F.2d 561 (7th Cir. 1972), cert. denied, 410 U.S. 928, 93 S. Ct. 1364 (1973); *Alomar v. Dwyer*, 447 F.2d 482 (2d Cir. 1971), cert. denied, 404 U.S. 1020, 92 S. Ct. 683 (1972); *Nunnery v. Barber*, 503 F.2d 1349 (4th Cir. 1974); *County & Municipal Employees v. Shapp*, 443 Pa. 527, 280 A.2d 375 (1971). Comment, Patronage Dismissals: Constitutional Limits and Political Justifications, 41 U. Chi. L. Rev. 297 (1974).

19. A relationship requiring personal loyalty or devotion also was suggested in *Ramsey v. Allen*, 501 F.2d 1090, 1098-99 (10th Cir. 1974).

20. *Nunnery* involved the manager of a state operated liquor store, a patronage employee, who contended that her discharge constituted a violation

By far the most instructive pre-*Roseman* case, however, was *Meehan v. Macy*, 129 U.S. App. D.C. 217, 392 F.2d 822, modified, 138 U.S. App. D.C. 38, 425 F.2d 469 (1968), affirmed en banc, 138 U.S. App. D.C. 41, 425 F.2d 472 (1969). Meehan was an employee of the Panama Canal Zone who had been discharged for arranging the printing and distribution of a scurrilous satire of the governor of the Canal Zone and his policies. The court recognized that although a free society values robust, vigorous, and essentially uninhibited public speech by citizens, when such speech by government employees produces intolerable disharmony, inefficiency, dissension, and even chaos, it may be subject to reasonable limitations, at least concerning matters within the duties, discretion and judgment entrusted to the employee involved. 302 F.2d at 833. Then, in an oft-quoted[21] passage epitomizing the pragmatism which all too frequently escapes judicial attention, Judge Leventhal stated.

> We think it is inherent in the employment relationship as a matter of common sense if not common law that an employee in appellant's circumstances cannot reasonably assert a right to keep his job while at the same time he inveighs against his superiors in public with intemporate and defamatory lampoons. We believe that [an employee] cannot fairly claim that discharge following an attack like that presented by this record comes as an unfair surprise or is so unexpected and uncertain as to chill his freedom to engage in appropriate speech.

of her civil rights. In affirming the district court's dismissal of the complaint, the court of appeals held since plaintiff had knowingly accepted her position on a patronage basis, her allegation that her discharge was for patronage purposes in violation of her First Amendment rights failed to state a claim under Section 1983. *Nunnery v. Barker*, 503 F.2d 1349, 1359-60 (4th Cir. 1974).

21. Most notably, this passage was quoted with approval in Mr. Justice Rehnquist's opinion for the plurality in *Arnett v. Kennedy*, supra note 16, 416 U.S. at 161-62, 94 S. Ct. at 1648. See also *Fisher v. Walker*, 464 F.2d 1147, 1154 (10th Cir. 1972); *Magri v. Giarrusso*, 379 F. Supp. 353, 358-59 (E.D. La. 1974).

Id. at 835. I fully agree, and find this reasoning quite apposite to the case at bar.

Roseman v. Indiana University of Pennsylvania, at Indiana, supra, represents the first definitive consideration by the Court of Appeals for the Third Circuit of those aspects in *Pickering* germane to this case.[22] Roseman was an associate university professor who alleged that the nonrenewal of her contract was at least in part in retaliation for her exercise of protected speech. Specifically, during the period of time in which her renewal was under consideration by the faculty committee on merit and tenure, she involved herself in a controversy concerning the chairmanship of her department. She complained to the dean of the college of arts and sciences that she believed the acting chairman was wrongfully suppressing the application of the candidate she favored. The following month, at the invitation of the dean, she repeated these charges at a meeting of the department's teaching staff. One week later, the commitee on merit and tenure, of which the acting chairman was a member, decided not to renew her contract, and university officials subsequently ratified that decision.

In its judgment for the defendants the district court rejected Roseman's free speech argument on two grounds. First, the court found that there were adequate work-

22. My research reveals that prior to *Roseman*, the only reference by the Court of Appeals for the Third Circuit to that portion of *Pickering* was the statement in *Alderman v. Philadelphia Housing Authority*, 496 F.2d 164, 173-74 (3d Cir. 1974), citing *Pickering* by way of a footnote, that

> [W]e acknowledge . . . that a governmental agency may have a significantly more weighty interest in regulating the speech of its employees than in regulating that of the populace at large . . .

related reasons for not renewing her contract.[23] Alternatively, the court concluded that her statements to the dean and at the faculty committee meeting were not protected by the First Amendment, and therefore permissibly might form part of the basis for her dismissal.[24] Although the Court of Appeals disagreed with the district court's reasoning on the first ground,[25] it affirmed, on the basis of *Pickering*, supra, the alternative rationale.

In distinguishing *Roseman* from *Pickering*, Judge Van Dusen said:

> The communications made by the plaintiff in the case before us differ from Pickering's in two crucial respects. In the first place, Roseman's expressions were essentially private communications in which only members of the Foreign Languages Department and the Dean of the College of Arts and Sciences were shown by the plaintiff to have had any interest. Pickering's letter to the editor, urging the electorate with respect to a pending tax proposal, was, by contrast, a classic example of public communication on an issue of public interest. In Pickering, as in other cases, the Supreme Court inquired into the public nature of a communication in determining the degree of First Amendment protection. As Roseman's communications were made in forums not open to the general public and concerned an issue of less public interest than Pickering's, the First Amendment interest in their protection is correspondingly reduced.
>
> The second respect in which Roseman's communications differ from Pickering's is in their potentially disruptive impact on the functioning of the Department. Pickering's attacks were on a remote superintendent and school board; in contrast, Roseman's called into question the integrity of the person immediately in charge of running a department which, it is fair to assume, was more intimate than a school district. The district court found that "plaintiff's attacks upon Faust's integrity in a faculty meeting would undoubtedly have the effect of interfering with harmonious relationships with plaintiff's superiors and co-workers." 382 F. Supp. at 1339. In making this finding, the district court reflected a similar concern expressed by the Supreme Court, which noted that Pickering's statements were "in no way directed towards any person with whom [Pickering] would normally be in contact in the course of his daily work as a teacher." Pickering, supra at 569-70. Because of this, Pickering's case raised "no question of maintaining either discipline by immediate superiors or harmony among coworkers." Id. at 570. The same obviously cannot be said of Roseman's faculty meeting accusations directed at the Acting Chairman of her Department. [footnote omitted].

520 F.2d at 1368-69. On the basis of those distinctions, the court concluded that Roseman's communications fell outside the protection of the First Amendment, and that therefore the University did not infringe her freedom of

23. *Roseman* v. *Hassler*, 382 F. Supp. 1328, 1331-32 (W.D. Pa. 1974).

24. *Id.* at 1340.

25. The district court had held that plaintiff had the burden of proving by a preponderance of the evidence that her non-retention was caused in substantial part by her exercise of the right of freedom of speech. *Id.* at 1339. Relying on *Skehan* v. *Board of Trustees*, 501 F.2d 31, 39 (3d Cir. 1974), vacated and remanded on other grounds, — U.S. —, 95 S. Ct. 1986 (1975), and *Simard* v. *Board of Education*, 473 F.2d 988, 995 (2d Cir. 1973), the Court of Appeals held that it is 'insufficient to find that other adequate grounds existed for a plaintiff's dismissal, or even that retaliation did not constitute a substantial part of the reason for his discharge. Rather, a plaintiff "need only prove that the discharge was 'predicated even in part on his exercise of first amendment rights.'" *Roseman* v. *Indiana University of Pennsylvania, at Indiana*, note 1 supra, 520 F.2d at 1367.

speech even if it considered her statements in deciding not to renew her contract.[26]

In terms of the aforementioned criteria, the instant case falls somewhere between *Pickering* and *Roseman*. Plaintiff here, like Pickering but unlike Roseman, aired his views in a forum accessible to the general public, namely a newspaper.[27] As in *Roseman* but not *Pickering*, however, plaintiff's communications here "called into question the integrity of the person immediately in charge," 520 F.2d at 1368, and were directed toward [a] person with whom [he] would normally be in contact in the course of his daily work," *Pickering*, supra, 391 U.S. at 569-70, 88 S. Ct. at 17. That plaintiff's statements would interfere with harmonious relationships with his co-workers, and indeed that they have totally precluded any future working relationship between him and the defendant, are beyond question.[28] Indeed, plaintiff himself implicitly concedes this

26. The court of appeals affirmed the district court's rejection of Roseman's other allegations, i.e. that her non-renewal violated her right to a pre-termination hearing and penalized her for her religious beliefs. Id. at 1366 n. 3.

27. I deem as inconsequential the fact that Pickering wrote a letter to the editor of the newspaper, while Mr. Sprague contends that he was sought out by reporters for an interview, see pages 2 & 3 supra.

28. Of the relationship between the district attorney and his first assistant, Mr. Sprague stated in his affidavit

> . . . the First Assistant District Attorney is the administrative head of the District Attorney's Office, whose job it is to see that the established policies are carried out.
>
> Invariably, District Attorneys use the First Assistant District Attorney for purposes of assistance in formulating policies in the first instance. When a policy has decreed by the Office of the District Attorney, it is the function of the First Assistant to see that the policy is followed.
>
> In the normal operation of the District Attorney's Office in Philadelphia, it is the First Assistant who, in fact, sees to the administration of the Office on a day-to-day basis. There are great numbers of Assistant District Attorneys in various units, each with its own department and its own administrative chief, all of whom report to the First Assistant. It is one of the First Assistant's functions to ensure that each unit is properly administered by the person in charge of that unit and that each one in fact is doing his duty. It is a function of the First Assistant to see that the District Attorney is kept advised as to the functioning of the Office. And, of course, the First Assistant must always be available for consultation in regard to handling investigations and supervising the various work of the Office including, especially, supervision of the prosecutorial work of the Office.
>
> Thus it can be said that the District Attorney sets policy for the District Attorney's Office, that the First Assistant sees that the policies of the District Attorney are carried out and that he day-o-day operaions of the Office are handled and carried out in a proper, expeditious fashion. The First Assistant is also an adviser to the District Attorney with regard to suggestions and implementations of various programs within a District Attorney's Office Affidavit of Richard Sprague, Document No. 14, 1-2.

point by his failure to seek relief in the form of reinstatement to his former position.[29]

The question becomes, then, whether the result in *Pickering* or *Roseman* controls where an employee's com-

29. By contrast, the plaintiffs in *Pickering v. Board of Education*, supra; *Acanfora v. Board of Education*, note 32 infra; *Roseman v. Indiana University of Pennsylvania, at Indiana*, supra; *Nunnery v. Barber*, supra; *Skehan v. Board of Trustees*, supra; *O'Brien v. Galloway*, 362 F. Supp. 901 (D. Del. 1973); and numerous other cases all sought reinstatement as an avenue of relief.

That plaintiff here did not seek to be reinstated may be owing in part to his serious disagreement with certain policies initiated by defendant, and to what he perceived to be the increasing isolation of his office. Mr. Sprague stated in his affidavit:

> In short, Mr. Fitzpatrick permitted the administrative functions of the First Assistant District Attorney to be undermined and, in large measure, rendered nugatory.
>
> In addition, during the same period, Mr. Fitzpatrick, notwithstanding his initial assurances that the advice and counsel of the First Assistant District Attorney would continue to be sought where policy matters were concerned, progressively excluded the First Assistant District Attorney from policy-making. One example of this aspect of the relationship was in the area of "plea bargaining." Contrary to prior practice—and contrary, in the opinion of your Affiant, to the proper administration of the criminal justice system—Mr. Fitzpatrick decreed that each Assistant District Attorney was free, on an individual case-by-case basis, to enter into any agreement, "deal," or plea bargain that he (the individual Assistant) decided upon without regard to other matters in the Office and without first having consulted with his (the individual Assistant's) superior, or with his (the individual Assistant's) superior, or with the First Assistant District Attorney or, indeed, the District Attorney himself.
>
> In my capacity as First Assistant District Attorney, I told Mr. Fitzpatrick that his "system" of plea bargaining was an anarchy. I further opined to Mr. Fitzpatrick that his "system" was not a responsible one in terms of the public trust which attaches to the Office of District Attorney. Nevertheless, Mr. Fitzpatrick continued with this policy of plea bargaining, justifying it in terms of prompt and expeditious disposition of serious criminal matters. Indeed, Mr. Fitzpatrick even rejected my suggestion that Assistant District Attorneys be required, after the fact at the least, to report in writing to him and to me any plea bargain which they had struck. The purpose of the reporting being, obviously, to ensure even-handed justice within the Office and to provide for proper supervision and administration of the Assistants.
>
> In a word, both in terms of administration and in terms of policy making, I was progressively relegated to being First Assistant District Attorney in name only . . .

Affidavit of Richard A. Sprague, note 28 supra, at 3-5.

munications touch upon matters of public concern[30] and are channelled through a public forum,[31] but nevertheless have such a calamitous and disruptive impact as to foreclose any possible effective working relationship between the employee and his immediate superior. I conclude that notwithstanding the publiccharacter of plaintiff's statements, *Roseman* is the stronger precedent here. Plaintiff's statements here are strikingly analogous to Roseman's accusations against her acting department chairman and quite unlike Pickering's attacks upon a "remote superintendent and school board." Plaintiff must have known and expected that the inevitable result of his statements—whether they be true or false—would be the abrupt termination of his employment. The practicalities inherent in the superior-subordinate situation presented here dictate that defendant's dismissal of plaintiff not give rise to liability under the Civil Rights Act.

For all the foregoing reasons, then, the complaint will be dismissed.

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30. Scandals at all levels of government within the last few years have demonstrated, if nothing else, that the truthfulness of an elected official with the public whose responsibility it is to serve is crucial to the integrity of the democratic process.

31. The Court of Appeals stated in *Roseman*, supra, that had the communications of the plaintiff in that case to the dean and at the faculty meeting been on issues of public interest, or had convinced local news media that her grievance was newsworthy, "entirely different considerations would come into play." 520 F.2d at 1368 n.10. In support of this proposition, the court cites *Acanfora v. Board of Education*, 491 F.2d 498, 500-01 (4th Cir.), cert. denied, 419 U.S. 836, 95 S. Ct. 64 (1974). There it was held that a teacher who had been transferred to a non-teaching position when school officials learned that he was a homosexual could grant interviews to the news media with the protection of the First Amendment.

But even in the passage cited in *Roseman* the court says

> There is no evidence that the interviews disrupted the school, substantially impaired his capacity as a teacher, or gave the school officials reasonable grounds to forecast that these results would flow from what he said.

491 F.2d at 498. And the opinion as a whole leaves no question that the actual or likely impact of a communication upon the employment situation is of paramount importance in considering the propriety of the employer's response to the communication. *Acanfora* is therefore in complete accord with my disposition of the instant suit.